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Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Compilation of comments by Governments and international organizations

Addendum

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* Submission of this note was delayed because of its late receipt.

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II. Comments received from Member States and international organizations

A. Member States

4. Belgium

[Original: French]
[12 May 2006]

These comments are limited to the draft legislative provisions on the written form of the arbitration agreement and to the draft declaration regarding the interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

1. As regards the draft legislative provisions on the written form of the arbitration agreement, three comments may be made.

1.1. The first relates to the fact that these draft legislative provisions set out two different proposals for revising Article 7 of the Model Law on International Commercial Arbitration and that it seems to be envisaged that these two proposals could be approved simultaneously by the Commission.

However, these two proposals would appear to be irreconcilable as the first one aims to soften the requirement in Article 7 that the arbitration agreement be in writing, whereas the second one aims to suppress it.

Belgium therefore considers that a choice should be made and that the first proposal, which aims to soften the requirement, is preferable.

The requirement that the arbitration agreement be in writing is a legitimate requirement given the impact of the agreement on the basic right of access to the courts. While it is reasonable to soften this requirement and thereby adapt it to the needs of international trade, Belgium considers that simply suppressing it would be excessive.

1.2. The second comment relates to the content of the first aforementioned proposal for revising Article 7 of the Model Law, and particularly to the formulation of its paragraph 3.

Belgium believes that this provision should not be interpreted in the sense that a written document which has nothing at all to do with the parties, such as a copy of the rules of an arbitration body, could be considered to constitute an arbitration agreement in written form.

On the contrary, paragraph 3 of Article 7 should be interpreted in the sense that, on the one hand, in all cases there must be a written document emanating from at least one of the parties, such as a written proposal, even in a simplified form, to conclude an arbitration agreement, but that, on the other hand, there is no need for the finalization of the contractual process to be documented as such by a contract "in due form", since it will be possible to prove its finalization on the basis of the existing written document.

An explanatory comment should make this point clearer.

1.3. Further to the preceding comment, Belgium wishes to make it clear that it is not in favour of the modification to Article 35.2 of the Model Law proposed with a view to suppressing the requirement that the party calling for the enforcement of an arbitral award must supply the original of the arbitration agreement.

Such a modification would create an undesirable disparity between the Model Law and the New York Convention.

2. As regards the draft declaration relating to the interpretation of the New York Convention, it would seem reasonable to consider that the purpose of this interpretative declaration is to establish a link between the proposed modifications to Article 7 of the Model Law and the New York Convention.

Belgium therefore considers that, if the revision of Article 7 of the Model Law aims to soften the requirement in this article that the arbitration agreement be in writing (see point 1.1 above), the purpose of the interpretative declaration should be to recommend that account be taken of such softening in interpretations of the same writing requirement formulated in Article II of the New York Convention.

Belgium therefore questions the appropriateness of including in the declaration a reference to Article VII of the New York Convention, since recourse to this article in the present context presupposes the disregarding of Article II of the Convention.